

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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INTEGRATED COMMUNICATIONS & TECHNOLOGIES, INC., et al.,	:	
Plaintiffs,	:	Civil Action No.
	:	1:16-cv-10386-LTS
v.	:	
HEWLETT-PACKARD FINANCIAL SERVICES COMPANY, et al.,	:	
Defendants.	:	

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

TELEPHONIC STATUS CONFERENCE

Tuesday, March 10, 2020
3:36 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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Official Court Reporter
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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is March 10th, the case of Integrated Communications, et al., vs. Hewlett-Packard, et al., civil action 16-10386.

Counsel, please identify themselves for the record.

THE COURT: So first, for the plaintiff, we have Mr. Joffe? Are you on the phone, Mr. Joffe?

MR. JOFFE: Yes, I'm on the phone, Your Honor. Mr. Joffe is here.

THE COURT: You have to speak up louder. We're having a hard time hearing you, Mr. Joffe.

MR. JOFFE: Okay.

THE COURT: Much better. I can hear you. You're there.

All right. And then Mr. McGuire, we have you?

MR. MCGUIRE: Yes, Your Honor.

THE COURT: And then for the defendants, who do we have? Mr. Saso?

MR. SASO: Yes, Your Honor.

THE COURT: And Mr. Callaghan?

MR. CALLAGHAN: Yes, Your Honor.

1 THE COURT: And Mr. Edgarton?

2 MR. EDGARTON: Yes, Your Honor.

3 THE COURT: And Mr. Bunis?

4 MR. BUNIS: Yes, Your Honor.

5 THE COURT: And then you have some people on the
6 phone with you, as well, from your side, who are just
7 listening, right?

8 MR. SASO: That's correct.

9 THE COURT: Fine. Okay.

10 All right. So I'll tell you a number of things
11 that I wanted to talk about in the status conference. I have
12 a number of items, and then I'm sure you may have some things
13 that you wish. So I'll start, first, with the small one.

14 How did two transceivers go missing? And I guess
15 the real question for me is this: This is what I understand
16 from reading the status report, and you can correct me if I'm
17 wrong. There were 781 transceivers returned by the Beijing
18 police. There were 781 received in the United States. There
19 was 781 examined by defendants' consulting expert in 2018.
20 781 signed out by defendants in 2019 for their testifying
21 expert. 781 examined by defendants' testifying expert, and
22 seemingly, 781 put back in the bags by this expert, based on
23 the documents I read.

24 Some unknown number returned by defendants to
25 plaintiff, because it appears that they weren't, again,

1 counted either -- that is, defendants said, "We looked at
2 781, put them back in the bags. We took all of the bags and
3 returned them," but I don't know that anybody -- I don't have
4 anything before me that says somebody counted the bags or the
5 items as they were returned. And likewise, I don't think I
6 have anything that says the plaintiffs counted them when they
7 received them back.

8 Some unknown number possessed at the warehouse by
9 plaintiffs. I say that only because I don't think I have
10 anything before me of a record of a count while they were
11 then in the warehouse, after they had been returned from the
12 testifying expert. And I don't have any information on
13 whether they were examined during that period of time or not.

14 Some unknown number given to plaintiffs' expert,
15 because I don't have anything about how many -- a count as to
16 when it was handed over. The plaintiffs' expert examined
17 779. And I infer from his information that he -- he examined
18 all the ones that he had had then in his possession.

19 Is that a fair summary of where things stand on the
20 number of transceivers?

21 MR. JOFFE: Your Honor, this is Mr. -- Dmitry
22 Joffe. Yes, that's correct, with one clarification.

23 When the defendants took custody of the
24 transceivers for the expert witness inspection, in May of
25 2019, they obtained the custody of 781 transceivers. But

1 when they returned the transceivers, they returned them
2 directly to the warehouse, and plaintiffs did not count them
3 after they were returned from defendants. And then
4 plaintiffs just delivered what was in the warehouse to their
5 expert, Mr. Fang, and Mr. Fang then inspected 779.

6 THE COURT: And then you draw the conclusion what?

7 MR. JOFFE: We draw the conclusion that the
8 transceivers went -- the two of them went missing between the
9 time they were given to defendants and the time when they
10 were given to plaintiffs' expert.

11 THE COURT: Okay. Well, I guess I would draw --
12 and I take it -- I hate to ask a really basic question, but
13 has anyone recounted them? Where are they right now, and has
14 anyone recounted them?

15 MR. JOFFE: I believe they're back in the warehouse
16 right now, and they were counted by Professor Fang, who
17 counted 779 of them.

18 THE COURT: Right. Okay. So let me just suggest
19 an obvious thing. Like we have multiple counts at 781, and
20 we have one count at 779. So I'll give you an example. Like
21 I don't know why this kind of issue seems to come up in this
22 case. Suppose -- suppose Person A is paying Person B \$72,
23 and counts out 72 one-dollar bills, and says, "I counted 72
24 one-dollar bills. Here they are," and hands it to them. And
25 then Person 2 later counts them and says, "There's 69

1 one-dollar bills." Rather than spilling a lot of ink, two
2 dollars must have gone missing along the way, I think the
3 first thing that I would suggest somebody do is, how about
4 recount? Maybe somebody made a mistake. I know he's a
5 professor at MIT -- I'm not saying he made a mistake; I have
6 no idea. But the first thing to do would be to count how
7 many are in the warehouse. Just see. People do make
8 mistakes, even professors at MIT.

9 So I don't know. You all can approach the problem
10 however you want, but it seems to me that before I'm going to
11 do anything about whether somebody stole transceivers,
12 somebody lost two transceivers, my suggestion would be, like,
13 count them. Like -- would be the following:

14 One, if you -- if one or both of you think it's
15 meaningful, count how many there are now. Both the two of
16 you send out two paralegals. Go there and together count
17 them, and see if they can agree how many are there. Maybe
18 there's 779, and then two definitely seem to have gone
19 missing along the way. And then I would -- has anyone been
20 in the warehouse between the time they were --

21 When the defendants return them, who took
22 possession of them? Mr. Joffe?

23 MR. JOFFE: Yes, Your Honor. The defendants
24 returned the transceivers to the warehouse, to the warehouse
25 manager.

1 THE COURT: So the warehouse manager took the --
2 presumably they were -- presumably they were in bags, and the
3 bags were in a box.

4 MR. JOFFE: Yes.

5 THE COURT: And he took the box and put them where?
6 They maintain possession of them, the warehouse?

7 MR. JOFFE: In the warehouse.

8 I believe Mr. Quigley, Kevin Quigley, who is on the
9 line, was the one who returned the transceivers to the
10 warehouse.

11 THE COURT: And then does the warehouse keep track
12 of each time the box is accessed?

13 MR. JOFFE: I'm not certain about that, Your Honor.

14 THE COURT: And does -- do you know -- I take it
15 who -- who can authorize access?

16 MR. JOFFE: Well, plaintiffs can authorize access.
17 They can call the warehouse.

18 THE COURT: Hold on one second, Mr. Joffe. Just
19 start again.

20 So you were saying plaintiffs can authorize access.

21 MR. JOFFE: Yes. They will call the warehouse
22 manager and authorize.

23 THE COURT: And am I correct that no one else can
24 authorize access?

25 MR. JOFFE: That's my presumption.

1 THE COURT: So in other words, if John Q. Smith or
2 Mr. Callaghan showed up at the warehouse and said, "I'd like
3 to see them," the warehouse manager would say, "Well, I don't
4 have you on the list. You're not authorized. I would need
5 to get permission from plaintiffs' counsel or plaintiff."

6 MR. JOFFE: That would be my presumption, Your
7 Honor.

8 THE COURT: All right. And do you know whether
9 anyone else saw them between defendants' return and sending
10 it out to your expert?

11 MR. JOFFE: Yes. I know that Plaintiffs Styller
12 and Jade Cheng looked at them in the warehouse, in the summer
13 of 2019. Correct.

14 THE COURT: After defendants' testifying expert,
15 and plaintiffs' expert?

16 MR. JOFFE: Correct.

17 THE COURT: And did they count them?

18 MR. JOFFE: No, they didn't count them at the time.
19 They just spot-checked them.

20 What happened is defendants produced their H3C
21 certification report in the summer of 2019. That report
22 describes the features of the holographic security labels on
23 the transceivers. And defendant -- and plaintiffs went to
24 the warehouse to check the labels to see if they could find,
25 you know, those indicia of counterfeit among them.

1 THE COURT: I see.

2 MR. JOFFE: They didn't count the full set of
3 transceivers.

4 THE COURT: And no lawyers went with them?

5 MR. JOFFE: No.

6 THE COURT: Okay. All right. Well, in any event,
7 I don't know -- what, if anything, do all of you want to do
8 about the seeming missing -- apparently missing two
9 transceivers? From my perspective -- let me tell you, as a
10 general picture, I brought that up because I thought it might
11 be -- at least we have the facts somewhat clarified. You can
12 figure that out, if you want.

13 Let me tell you a couple of things that I want to
14 figure out today or talk about. But some of the questions
15 that I was thinking about are these:

16 What I understand where we are is that the next
17 step is going to be motions for summary judgment regarding
18 the question of the counterfeit question. And what I
19 understand from the status report is that defendants wish to
20 make two additional motions related to that.

21 One is, they wish to make a motion to exclude
22 plaintiffs' expert. And so a question that I have is a
23 little -- I wanted to hear a little more about the basis for
24 that, but also whether the two sides think that -- I'm
25 inclined to think it should be simultaneous with summary

1 judgment; that is, move for summary judgment, and separately,
2 or within your motion, explain why it should be struck. And
3 then, you know, you could say, "You win, without -- the
4 expert should be struck for this reason, and without him, you
5 win for this reason." And even if you lose the striking, I
6 assume you think you win, anyway. I don't know that, but I'm
7 just guessing.

8 And then you could oppose, Mr. Joffe, and say why
9 your expert doesn't get struck, and why, therefore, he's in,
10 and why you prevail -- you defeat the motion, whether he's in
11 or out. I assume that's likely to be your position.

12 MR. JOFFE: Yes, Your Honor.

13 THE COURT: So I guess the question -- does that
14 make sense, we should do it simultaneously?

15 MR. BUNIS: Your Honor, this is Michael Bunis. And
16 let me address the question about whether we should do it
17 simultaneously.

18 But first, I want to make sure I understand it
19 correctly, that at least as late as the filing of the joint
20 report, the plaintiffs indicated that they would be moving
21 for summary judgment, a cross-motion for summary judgment.
22 And our position, with respect to that motion, is that
23 there's no basis for the plaintiff to move for summary
24 judgment on the issue that the products are counterfeit, even
25 with the Fang report, but certainly with not -- without the

1 Fang report.

2 And frankly, as I think Your Honor knows, set forth
3 in the defendants' position on the joint report, the Fang
4 report -- first of all, Dr. Fang, although an expert, doesn't
5 give any opinion that the equipment is counterfeit. He --
6 that is not his opinion at all, and he admits that in his
7 deposition.

8 Second, as we also put forth in the report,
9 Dr. Fang's report, it was -- really just compares his view of
10 these transceivers to two hearsay documents, which are
11 entirely improper for summary judgment and are, in our view,
12 completely inadmissible in this case.

13 And frankly, the Court identified this issue, dare
14 I say, a year or more ago. And so our position is that there
15 shouldn't be any cross-motion for summary judgment on the
16 part of the plaintiffs, because they don't have a good-faith
17 basis to do so.

18 With respect to the defendants' motion for summary
19 judgment, we have a draft *Daubert* motion to exclude Dr. Fang.
20 We are prepared to file that. If the Court would prefer that
21 we file that together with the motion for summary judgment,
22 we can do that. We -- currently, the *Daubert* motion, Your
23 Honor, is nine pages.

24 THE COURT: I guess my preference is I wouldn't
25 want to delay summary judgment until the resolution of that

1 issue. I don't have an objection to -- if you wanted to file
2 your *Daubert* motion today, and summary judgment is not due, I
3 don't have it in front of me, to whatever date, I don't mind
4 then if they're separate. But what I don't want to do is,
5 say, hold summary judgment until that issue is resolved.

6 MR. BUNIS: No problem. We will file them -- we
7 will not delay summary judgment on the filing of that, and we
8 will file *Daubert* right away. I just want to tee up the
9 issue of --

10 THE COURT: I get it.

11 Mr. Joffe, are you planning to cross-move for
12 summary judgment on the counterfeit issue, based on your
13 expert's report?

14 MR. JOFFE: Yes. Yes, Your Honor.

15 THE COURT: So my question would be this.
16 Assuming, for the moment, for sake of discussion, that I were
17 to reject their motion challenging your expert. So your
18 expert was in and was somebody who could be relied upon. And
19 assuming that he could rely upon those documents upon which
20 he did rely, don't I have to draw -- it's your motion for
21 summary judgment. I would have to draw all reasonable
22 inferences in their favor, correct?

23 MR. JOFFE: Correct.

24 THE COURT: I would not be able to draw inferences
25 in your favor.

1 MR. JOFFE: That's correct, Your Honor.

2 THE COURT: So he doesn't -- he does not say it is
3 counterfeit; he says it has indicia -- he says there are
4 these markers of counterfeiting that have been identified by
5 the company H3C. I find those here. I understand why, if
6 the report's in evidence, why, perhaps, it's a reasonable
7 inference for a fact-finder to draw from that, that they were
8 counterfeit. But why -- how can I draw that inference on
9 summary judgment?

10 MR. JOFFE: Well --

11 THE COURT: In your favor, on your motion.

12 MR. JOFFE: On my motion, we will challenge --
13 obviously we will challenge Mr. Raina's report and
14 conclusions.

15 THE COURT: Sure. But hold on. You have two
16 parts. One part is they're going to move for summary
17 judgment on counterfeit. You're going to oppose. You get to
18 do that whether or not you have your expert. You get to
19 oppose that. No problem. I don't know what the resolution
20 of that motion is, but no problem.

21 You want to cross-move for summary judgment. Your
22 cross-motion says, "Plaintiffs win. These things are
23 counterfeit, and we can win that. And we win that" -- I am
24 assuming now, for that motion, that your expert report is in.
25 But how do you win that, even on your expert report, even if

1 there's no other evidence? I have to draw an inference in
2 your favor in order to reach the counterfeiting conclusion,
3 and how do I do that on your motion?

4 MR. JOFFE: There is also, in addition to
5 Professor Fang report, there is other evidence in our favor,
6 Your Honor, the evidence -- the documents that Mr. Fang cites
7 in his opinion, the HC3 certification report. It was
8 produced by defendants themselves last summer. It was
9 described in Mr. Saso's declarations as a verification report
10 that H3C provided to the PSB, the Chinese police. It
11 describes it as the verification report submitted and
12 explaining the position concerning the counterfeiting
13 allegations. That's also in Mr. Saso's declaration. And the
14 privilege log contains numerous entries for defendants' own
15 comments, edits, draft, and template regarding the
16 certification report.

17 And then they have a letter to the PSB, final
18 letter, that says that H3C determine, based on the labels,
19 holographic labels attached to the transceivers, that the
20 transceivers were counterfeit. Not just March draft of the
21 letter, but they want a sanitized version in April.

22 THE COURT: So you concede, then, that your expert
23 report can't be a basis for you to win summary judgment, is
24 what I hear you saying. And it's not really a sensible -- I
25 mean, you can say -- I guess what I hear you saying is,

1 "Judge, I can win summary judgment, not on my report, expert
2 report, but I could win summary judgment because there's a
3 letter that H3C sent to the Beijing police, and that letter
4 says that the transceivers are counterfeit."

5 MR. JOFFE: And the H3C verification report have
6 fingerprints of defendants on it. They've drafted it
7 together.

8 And there is another important fact that TT Global
9 transceivers, at the same time, when they were in the hands
10 of ICT, they were tested by H3C, and then the defendants had
11 TT Global destroy those transceivers because of their
12 questionable nature. And they paid \$200,000 to TT Global to
13 destroy those transceivers.

14 And there is also defendants' own correspondence
15 with Inspira, the original provider of that equipment,
16 showing that Inspira never provided defendants with serial
17 numbers of the transceivers on the bills of entry, and that
18 HPFS India never inspected the transceivers upon receipt.

19 So there is a chain of documents that shows pretty
20 clearly that --

21 THE COURT: And you believe that those documents,
22 drawing all reasonable inferences against you --

23 Right?

24 MR. JOFFE: Reasonable inferences from those
25 documents, drawn in defendants' favor, I believe that those

1 documents will show that the transceivers did, in fact, carry
2 the counterfeit trademark, registered trademarks.

3 And Your Honor, my clients were investigated and
4 detained in China, based on the suspicion of selling
5 commodities bearing counterfeit registered trademark. That
6 was the charge that the police --

7 THE COURT: Do you understand the difference
8 between probable cause and truth?

9 MR. JOFFE: The difference between probable cause
10 and truth, well, that's --

11 THE COURT: Your clients were detained. Nobody
12 disputes that. Your clients were detained based on an
13 allegation that they were selling counterfeit transceivers.
14 I not -- I don't think defendants dispute that, although I'm
15 not positive. But in our parlance -- I'm not saying that the
16 Chinese follow our parlance, but I imagine that the concepts,
17 in some way, are similar -- they were detained for those
18 things. That doesn't mean it's true that they did those
19 things. They were exonerated by the Beijing police.

20 There are many reasons why they could have been
21 exonerated. One reason they could have been exonerated is
22 they didn't know what they were doing, that is, they didn't
23 know they were selling counterfeit devices. Another reason
24 they could have been exonerated is the determination that the
25 devices weren't counterfeit. I don't know. But all I'm

1 saying is the fact that they were detained is not proof --
2 that's like probable cause. It isn't proof that, in fact,
3 the things were counterfeit.

4 And so I guess, to your point, Mr. Bunis, your
5 point, as I understand it, Mr. Bunis, is you don't think
6 Mr. Joffe has a good-faith basis to file a motion for his own
7 motion for summary judgment, because you don't think that
8 drawing -- applying the Rule 56 standard, drawing all
9 reasonable inferences in your favor, as would be -- as is
10 required and he concedes, that there would be a basis for
11 summary judgment. As to whether that's -- that seems fairly
12 clear as to his expert, and I don't hear Mr. Joffe explaining
13 how his expert can support his own motion for summary
14 judgment.

15 It doesn't mean his expert, if in, can't support
16 judgment at trial. I'm not weighing in on that at the
17 moment. But it doesn't seem like his experts can support a
18 motion for summary judgment. Maybe it can be explained to me
19 why it could. He's identified a bunch of other evidence. I
20 don't think it's a -- that we're going to resolve that
21 question at the time, at the moment.

22 What I suggested is this: The summary judgment
23 sequence should be defendants move for summary judgment,
24 supported by their memo in support of summary judgment. Then
25 plaintiffs -- this is right out of my standard policy on

1 summary judgment. Plaintiffs have an opportunity to file one
2 document that's an opposition and a cross-motion for summary
3 judgment, a memo. Obviously I would assume that it would
4 address, to some degree separately, the two issues, because
5 separate legal standards apply. Then you have the
6 opportunity, defendants, or you, Mr. Bunis, whoever is doing
7 it, to file one document, which is your opposition and reply.
8 And then you get one more document, Mr. Joffe, which is your,
9 essentially, sur-reply.

10 I will -- you may raise, Mr. Bunis, in your
11 opposition reply, if you think there's no good faith -- that
12 you not only win the motion, but there's no good-faith basis
13 for it, you can win -- you can raise that. As a general
14 practice, not always, but I'll tell you, I generally try to
15 eyeball motions when they're filed so that if I see something
16 that stands out, that might lead to quicker resolution, I can
17 jump in.

18 You have alerted me that I should look at the
19 motion and see whether I might jump in, if I read it in light
20 of this, and I think, "Wait, there's no basis for this
21 motion." If I don't do that, it doesn't mean there isn't, it
22 just may mean that I didn't do it or it may mean that I'm
23 leaving it to you.

24 But I'm not sure, unless you have another
25 suggestion, Mr. Bunis, that there's more that we can do with

1 that at the moment.

2 MR. BUNIS: That's fine. This is Michael Bunis,
3 Your Honor. We understand, and that's fine.

4 I just want to point out one other point when you
5 ask me did I agree with that, just before you laid out the
6 schedule, and I wanted to say, yes, I do agree with that. I
7 just wanted to point out one other thing. With respect to
8 any plaintiffs' motion for summary judgment, you know,
9 Rule 56 is clear that you can't rely on inadmissible evidence
10 to form the basis of a motion for summary judgment.
11 Actually, you shouldn't rely either way to oppose or to move
12 for summary judgment.

13 And the rule is clear that if the -- the evidence
14 is challenged, that is to say, if the documents -- and in
15 this case, it's more than just Exhibit 3 and 4 to the Fang
16 report; it's also several of the documents that Mr. Joffe
17 referred to when he was asking you about the additional
18 evidence. If that's challenged, and it is, it's clear that
19 we've challenged this all along as being improper hearsay,
20 the burden is on the plaintiff to demonstrate the
21 admissibility of those documents.

22 So I really just wanted to sort of point that out,
23 Judge, because we obviously don't think that there's any
24 basis that any of that stuff comes in. And in fact, my
25 memory is that the Court identified exactly this issue to the

1 plaintiff some time ago, pointing out, for example, in the
2 transcript, that H3C was not a defendant in this case, and
3 frankly, at that time, over a year ago, asking, for example,
4 whether they intended to seek discovery directly from H3C,
5 and clearly they haven't.

6 In fact, as we pointed out in the report, they
7 haven't even obtained certified translations of these Chinese
8 documents. And again, those are just the documents that are
9 attached to the Fang report. The same issue with respect to
10 admissibility applies to certain of the other documents that
11 I presume the plaintiffs would use to support their
12 cross-motion for summary judgment.

13 So anyway, I apologize for going on, Your Honor,
14 but there's an issue of admissibility, as well.

15 THE COURT: Right.

16 My only suggestion is this, further suggestion on
17 that. I'm a big believer in conferral. I am -- and I, even
18 on dispositive motions, because I think sometimes you can
19 narrow the issues of dispute, I commend it to you. I
20 understand that it's not always a successful process. And
21 so -- but I would urge you to do that, because I think that
22 it will aid all of you in focusing the issues, and it will
23 save your clients money.

24 And the second, I'll just remind you all, with
25 respect to the summary judgment briefing that's coming, that

1 as a general matter, I -- as I've sometimes said to some
2 lawyers, I wish there were a plug-in to Adobe when I'm
3 reading the PDFs that eliminated all adjectives, because I
4 find that characterizations don't advance the ball. If the
5 other side was outrageous, just show me the facts. But the
6 opinion that it's outrageous doesn't really move me. So
7 anyway. All right. So that is one of the issues.

8 Are there any -- another question that I had was
9 the defendants indicate they are going to make a spoliation
10 motion. Does that bear on summary judgment?

11 MR. SASO: Your Honor, this is Paul Saso on behalf
12 of the defendants.

13 It is possible that one of the sanctions that the
14 Court could imply -- apply in the case could impact summary
15 judgment. We think that you could, for example, take adverse
16 inferences from the spoliation, not just at trial or instruct
17 a jury at trial, but that Your Honor could also take such an
18 adverse inference on summary judgment.

19 THE COURT: Well, let me circle back to this in a
20 moment.

21 The way I see this case proceeding is we have
22 summary judgment process coming. If possible, you're going
23 to do some depositions while summary judgment is being
24 briefed, because this is an old case and it's taking too
25 long.

1 And then when summary judgment is done, I'll review
2 the papers, I'll decide it. Once it's done, the resolution
3 of that, putting aside spoliation for the moment, neither of
4 you seem to think, from the Court's perspective, resolves the
5 case. And then what I understand is you think it focuses it.

6 And then there's some more deposition discovery
7 regarding the remaining issues in the case, but you think the
8 resolution of this will help focus that discovery. And then,
9 after that, we're presumably ready for trial.

10 Is that the general outline of -- and you are
11 obviously free to settle it at any point if you want to. But
12 that's the resolution, absent a settlement, the process.

13 That big picture, you both agree with that?

14 MR. JOFFE: This is Dimitry Joffe. I do, Your
15 Honor.

16 MR. BUNIS: Presumably, Your Honor, that's the
17 process. I don't know whether, if there's an outcome of, for
18 example, the spoliation motion that might mean that there
19 would be a subsequent dispositive motion that would eliminate
20 trial on any of the issues.

21 THE COURT: So I guess that's my question, then, is
22 with respect to spoliation, it seems to me, if you're not
23 asking me to draw -- if the summary judgment that's coming
24 now stands on its own, it stands on its own. You can make
25 the spoliation motion later. If what you're saying is -- I

1 don't know what exactly you want from the spoliation. Do you
2 want -- are you asking me to just draw inferences at
3 the trial, like instruct the jury at the trial, allow
4 introduction of that evidence? Then it seems like a
5 trial-related motion; we don't need to deal with it yet.

6 Are you asking that, as a sanction, that I enter
7 judgment against the plaintiffs? That's obviously a -- a
8 very big sanction. I think the law, generally, favors
9 proportional sanctions and favors resolution on the merits.
10 It isn't to say -- I'm not saying that that isn't possible.
11 I don't know. But that is the general view of the law in the
12 circuit.

13 So I don't know where -- in terms of scheduling,
14 where you want to locate filing your spoliation motion.

15 MR. SASO: Yes, Your Honor, again, Paul Saso on
16 behalf of the defendants. If primarily your question is
17 about timing, the defendants anticipate filing the motion
18 essentially along the same timeline as a briefing schedule
19 for summary judgment. We do believe that we are ready to
20 make that motion.

21 And I do think that there are multiple parts of the
22 spoliation issue that would lend themselves to different
23 kinds of sanctions. And some of them may be applicable here
24 at summary judgment; some of them may be applicable later at
25 trial. But we think that the briefing is ready to be done

1 now.

2 THE COURT: All right. So you want to do it now.

3 MR. SASO: Yes, Your Honor.

4 THE COURT: And some of the relief you're asking
5 for would be relief related to summary judgment?

6 MR. SASO: We believe that's one of many options,
7 yes, Your Honor.

8 THE COURT: Okay. All right. So when --
9 Maria --

10 Or maybe you can -- I don't have the schedule right
11 in front of me. When is the summary judgment motion due?

12 Or Maria, do you have the date for that?

13 MR. MCGUIRE: I believe it's the 16th, Judge.

14 THE COURT: 16th of March?

15 MR. MCGUIRE: Yes.

16 THE COURT: All right. So you anticipate, by
17 March 16th, defendants file a motion for summary judgment, a
18 separate motion for spoliation sanctions, and possibly either
19 incorporated -- either as a separate motion or incorporated
20 into the summary judgment, the motion to strike the
21 plaintiffs' expert?

22 MR. MCGUIRE: That's correct.

23 THE COURT: All right. And then --

24 MR. SASO: Your Honor, I'm sorry, this is Paul Saso
25 for the defendants.

1 I think it is a short period of time. I think that
2 the 16th is this coming Monday. I think that given today's
3 conference, whether it is on the substance of the summary
4 judgment, I'll maybe leave that up to my colleagues up at
5 Choate as to whether the discussion during today's conference
6 leads them to think that they may request a little bit more
7 time. But I think when it comes to the sanction motion, we
8 would also sort of anticipate maybe an additional week or two
9 would be helpful.

10 THE COURT: Okay. Mr. Bunis?

11 MR. BUNIS: I don't want to bid against my
12 colleague, but we -- we'll have the motion for summary
13 judgment and incorporated or separately with the motion to
14 strike in on the 16th.

15 THE COURT: I'm sorry, you can or -- yes or no?

16 MR. BUNIS: Yes.

17 THE COURT: All right. So you're saying summary
18 judgment and *Daubert* on the 16th. And Mr. Saso is saying the
19 23rd or the 30th for the spoliation motion. Is that fair?

20 MR. SASO: Your Honor, I think that that's -- this
21 is Paul Saso again. I think that that is fair. And
22 given that there will -- I don't think that there will be a
23 need for the four-way back and forth with cross-motions. I
24 think that the briefing may still very well be able to be
25 completed simultaneously with summary judgment.

1 THE COURT: Okay. Mr. Joffe, do you want --

2 Well, if we just did the ordinary course, 3/16
3 they're going to file summary judgment and *Daubert*. Do you
4 want the 23rd or the 30th, Mr. Saso?

5 MR. SASO: We will have it filed by the 23rd.

6 THE COURT: 3/23 for spoliation. That would mean
7 two weeks for that ordinarily would be 4/7, and 30 days for
8 summary judgment would be 4/16. If you want 4/16 for the
9 whole thing, I don't have a problem with that.

10 MR. JOFFE: Yes, Your Honor, I think 4/16 will do
11 for both of them.

12 THE COURT: I mean, I'll give you, if you want 4/7
13 for spoliation, you can have that. I'm not -- what do you
14 want? Do you want 4/16 to respond to both?

15 MR. JOFFE: 4/16 for both will be fine, Your Honor.

16 THE COURT: So this is the schedule. March 16th,
17 summary judgment and *Daubert* motions by defendants.

18 Are you getting this, Maria?

19 THE DEPUTY CLERK: Yup.

20 THE COURT: March 23rd, spoliation motion by
21 defendants.

22 April 16th, plaintiffs will file the following:
23 One, an opposition to the spoliation motion; two, a single
24 memo opposing summary judgment that could either be merely an
25 opposition or it can be an opposition -- the memo can be just

1 an opposition or an opposition supporting a cross-motion.

2 For now, am I correct, I should assume for now,
3 Mr. Joffe, that you're filing a cross motion?

4 MR. JOFFE: Yes, Your Honor.

5 THE COURT: All right. So then it's a single memo,
6 30 pages to oppose and supporting cross-motion.

7 And I assume you're doing a separate *Daubert*
8 motion, Mr. Bunis?

9 MR. BUNIS: That's correct, Your Honor.

10 THE COURT: And then a separate opposition to the
11 *Daubert* motion, all due on the 16th.

12 Then --

13 MR. JOFFE: Your Honor, and what's the page limit
14 on the separate position to *Daubert*?

15 THE COURT: So there will be -- it's 20 pages on
16 the -- this is how it will be. On the motion for summary
17 judgment, defendants get 20 pages for their memo and 20 pages
18 for their *Daubert* memo, and 20 pages for their spoliation
19 memo, because 20 pages is the maximum -- is the default under
20 the local rules for a memo.

21 And then for your opposition to the spoliation
22 memo, it's 20 pages, and your opposition to *Daubert* is
23 20 pages. Your summary judgment memo, which is opposing
24 theirs and supporting yours is 30 pages.

25 MR. JOFFE: Okay.

1 THE COURT: Okay. Then you have, for the
2 defendants, a couple things: a reply to the spoliation and a
3 reply to the *Daubert*, which ordinarily would be five pages
4 and ordinarily seven days. And then ordinarily your reply
5 opposition memo on the summary judgment, because it's another
6 summary judgment motion, I'd ordinarily give you 30 days.

7 Do you want to do seven days and then 30 days, or
8 how do you want to structure that?

9 MR. BUNIS: One second, Your Honor.

10 Yeah, Your Honor, I don't think we need 30 days to
11 do the opposition, to the extent there is one, on the
12 cross-motion for summary judgment. I think we can do it in
13 two weeks.

14 THE COURT: Okay. So why don't we say this. We'll
15 say 4/30, and that will be for everything. Your reply on
16 spoliation, five pages; your reply on *Daubert*, five pages;
17 and your opposition to your -- one document, which is both
18 your reply in support of your motion for summary judgment and
19 your opposition to Mr. Joffe's motion for summary judgment,
20 which is 20 pages.

21 MR. BUNIS: Assuming that he makes one, right?
22 There's still hope that that won't happen.

23 THE COURT: Correct. If he doesn't make one, if he
24 just opposes you, then that document is just a reply, and
25 then it's five pages.

1 MR. BUNIS: Understood.

2 THE COURT: And then assuming he does, because he's
3 told me he will, then, Mr. Joffe, you'll be entitled to file
4 a reply in support of your cross-motion for summary judgment,
5 and that document will be ten pages.

6 And is a week enough time for that?

7 MR. JOFFE: Yes, Your Honor.

8 THE COURT: Okay. So plaintiffs' reply, due
9 May 7th, on the summary judgment, ten pages. Then we'll be
10 done with the briefing on all of that. So we have a schedule
11 on that.

12 I will then read it and schedule a hearing, likely.

13 And two, just a couple requests with respect to the
14 summary judgment particularly, but all of this. One, on the
15 statement of facts, just so we're clear, I think, Mr. Bunis,
16 you might be familiar with this from another case, but I
17 don't recall at the moment. The rest of you might not be.
18 What I like, it's laid out on the website. But so you move
19 for summary judgment, you have a statement of facts. You
20 send it to Mr. Joffe.

21 Mr. Joffe, you're going to, like, fact number one,
22 let's say fact number one, they say is the three individual
23 plaintiffs were detained by the police. What I want you,
24 Mr. Joffe, to do when you say "admitted," is take the
25 document they sent you, with the assertion of fact, and then

1 right under it say "Admitted," rather than just say, "Number
2 one, admitted." And then you might add -- and you'll have
3 your response -- so you'll embed your responses in the
4 document he sent you, and then you'll file that document with
5 your opposition. And you might add facts to it, because
6 maybe there's other facts that bear on your cross-motion, if
7 you make one.

8 And then you, Mr. Bunis, will take that document
9 that he sent back to you in Word, or whatever format, and
10 embed it, so the last -- the document that's filed last of
11 the statement of facts will be the only one any of us really
12 read, especially me, because it will have all of the
13 assertion of facts and all of the responses.

14 Do you all follow me?

15 MR. JOFFE: Yes, Your Honor.

16 THE COURT: So I don't have to -- what it saves --
17 I'll just tell you, it saves me printing out multiple
18 documents and matching the admit to the assertion. So the
19 first request that I have is you follow that practice,
20 because it makes it dramatically easier to resolve your
21 motion for summary judgment.

22 The second request that I have is you should --
23 this is a request, not a requirement, and I mean that
24 seriously, just a request. But there is something called
25 "LinkBuilder." Have I referenced it to you before?

1 MR. BUNIS: You have.

2 MR. JOFFE: You did, Your Honor.

3 THE COURT: It allows you to embed hotlinks to ECF
4 documents. This would be helpful in doing in your briefs.
5 And you could talk -- if you need some help with it, Edis
6 Feldhouse, who's in our IT department.

7 I will tell you, I just had closing arguments in a
8 bench trial in a patent case and they provided me hotlinked
9 of their final briefs, and it was exceptionally helpful in
10 going through. You can't -- the two things you need to know
11 is you can't link to sealed exhibits, and you need to have
12 whatever you're linking to when you compile the links, need
13 to already be on ECF.

14 It's not that complicated. I've done it. The
15 hardest part is getting over the psychological part that it's
16 just one more thing to do. But it really doesn't take very
17 long. It's really very easy. So I'm not requiring you to do
18 it. If you don't do it, I'm not going to draw an adverse
19 inference or hold it against you. But if you do do it, it is
20 much appreciated by my law clerks and myself, because it does
21 make a big difference in making it easier, especially in
22 something like this where I imagine there will be a fair
23 number of record cites.

24 The third request with respect to the statement of
25 facts is that some people -- and I don't say that any of you

1 would do this, but I'm bringing it up because it has happened
2 recently a number of times. Some people seem to digress into
3 argument in the statement of facts. They -- for example,
4 let's say Mr. Joffe asserts these three people were arrested
5 and detained. Some people would respond to that by saying,
6 "Well," and give me this long explanation of why it's not
7 defendants' fault that they were arrested and detained.

8 But they were arrested. I don't think defendants
9 dispute that those three people were arrested and detained
10 for some period of time. They were -- if the assertion of
11 fact just says they were arrested and detained, just admit it
12 because that's what happened. You don't dispute that. That
13 doesn't mean you were responsible. That's a different thing.
14 And you can argue in your brief about why you're not
15 responsible.

16 And so it's not an opportunity, I guess is my
17 point, to evade the page limitations. If you really think
18 you need more pages, come to me for more pages. Don't stick
19 it in in the argument, in the statement of facts.

20 Okay. So we have the schedule for summary
21 judgment. You've heard my complaints or my requests.

22 What depositions -- do you think you can agree on
23 what depositions you can do while this is all going on? In
24 other words, what I'm thinking about is this. I want to set
25 the trial date. So let's say all these motions are ripe by

1 May 7th. I'm going to resolve them. Don't expect that it's
2 going to take me six months to resolve them. I'm going to
3 resolve them before that. But there's going to be a period
4 of time for me to resolve them. All right.

5 Then you need a period of time to do the rest of
6 the depositions. Let's suppose, for the moment, you don't do
7 any depositions between now and May 7th. How long do you
8 need to -- let's say you don't even do any depositions until
9 I resolve it. Let's say I resolved it on May 31st, which is
10 a bit optimistic. How long would you need from June 1st to
11 do your depositions? Approximate.

12 MR. SASO: Your Honor, Paul Saso for the
13 defendants. I think that we can conduct all of the
14 depositions in three months from the date of resolution of
15 the summary judgment motions.

16 THE COURT: All right. Mr. Joffe?

17 MR. JOFFE: Your Honor, I agree, but -- I think
18 with the three months sounding like a reasonable period of
19 time. But I think defendants seeking 20 depositions, I think
20 that's excessive and --

21 THE COURT: Let me pause you there, Mr. Joffe.

22 When you say that, Mr. Saso, how many depositions
23 do you anticipate taking?

24 MR. SASO: We anticipate taking -- in the status
25 report, we listed the 19 to 20 depositions that we expect to

1 take.

2 THE COURT: Okay. So you would say you want to
3 take 19 to 20. You can do those in those three months. And
4 during that time, you can do however many.

5 How many did you say, Mr. Joffe, you want to take?

6 MR. JOFFE: We have ten, Your Honor.

7 THE COURT: Ten. And how many of your ten overlap
8 with his 19 or 20?

9 MR. JOFFE: They don't overlap, Your Honor.

10 THE COURT: Okay. They don't. So you want to
11 take, essentially, ten people from the defendants, right?

12 MR. JOFFE: Yeah. Correct, Your Honor.

13 THE COURT: And let me just take a look at the
14 list.

15 So you want to depose each of the plaintiffs.
16 That's 11 depositions.

17 Who is Mr. Quinn?

18 MR. SASO: Your Honor, Mr. Quinn worked for ICT.
19 He's a former employee and worked in China at the time of the
20 events that are relevant to this case, and you also may
21 remember filed a separate case more than a year ago that was
22 dismissed on a motion to dismiss for --

23 THE COURT: Oh. I remember the case. All right.
24 So who's Mr. Pekar?

25 MR. SASO: Mr. Pekar is also a former ICT employee.

1 He was, I think, instrumental in the early parts. He was --
2 worked on creating the relationship between ICT and HP and
3 entering into the agreements that underline this case.

4 THE COURT: And Mr. Faybush.

5 MR. SASO: Mr. Faybush is a -- I believe he may
6 also be a former ICT employee. He is in -- he pops up
7 frequently in plaintiffs' document production as someone who
8 was related to buying and selling H3C equipment, as well as
9 shipping back a stock of the equipment from China to the
10 United States, following the imprisonment of the individual
11 plaintiffs.

12 THE COURT: Sadovnikov?

13 MR. SASO: Yeah, Mr. Sadovnikov I think is a former
14 shareholder of ICT. He created their IT infrastructure, and
15 he was -- he participated in the migration of the ICT e-mails
16 from a physical server to the cloud and may have been part of
17 the process of determining whose e-mails would be migrated.

18 THE COURT: Makarovsky?

19 MR. SASO: Mr. Makarovsky is, I believe, a current
20 employee at ICT. He is an -- I'm sorry, an IT person for
21 IC -- for -- excuse me with the abbreviations. He is an IT
22 person working for ICT, and, therefore, is more knowledgeable
23 with respect to more recent developments in connection with
24 their e-mail and ESI issues.

25 THE COURT: And Grabkovksy?

1 MR. SASO: I will make that a little bit more
2 simple. I understand that he goes by the name of "Tony
3 Grabo." He was the main point of contact for ICT, with their
4 outside vendor who did the e-mail migration. He also talked
5 with Mr. Sadovnikov about whose e-mails should be migrated.
6 And he also looked into whether or not any of the data that
7 was lost could -- was backed up and could be retrieved.

8 I'm sorry, one last part about Mr. Grabo, which
9 makes him particularly interesting, is that he is the person
10 who likely performed the deletion of the individual
11 plaintiffs' and Mr. Quinn's e-mails while they were still in
12 prison in China.

13 THE COURT: And Shinto and iHub?

14 MR. SASO: Shinto, Your Honor, is the broker who
15 took possession of the equipment in India and was responsible
16 for shipping it to ICT.

17 THE COURT: And iHub?

18 MR. SASO: And iHub is also, we understand, sort of
19 a warehousing as well as shipping company that helped ICT get
20 the equipment into and out of China, as well, after the
21 imprisonment and would have information related to, you know,
22 the importation and possibly any other documents that ICT
23 should have obtained in order to do business or sell this
24 equipment in China.

25 THE COURT: So would it be fair to divide up your

1 deponents the following way? Persons 12 to 16, which
2 constitutes four or five depositions, plus persons one, two,
3 three, and four, so eight or nine depositions, are people
4 with knowledge of the events giving rise to the lawsuit?
5 That is the sale of the -- they are involved in the sale of
6 the goods. They are involved in the shipment of the goods.
7 They are involved with the sale of the goods in China. They
8 were imprisoned in China. That's those eight or nine people.

9 And then the deponents you list on your document as
10 five to 11, the purpose of their depositions is they're
11 seeking damages, primarily. And conceivably, they might have
12 knowledge about some of the matters of their relatives who
13 are persons two, three, or four, and so that will be the two
14 purposes for their depositions, primarily.

15 MR. SASO: Yes, Your Honor.

16 THE COURT: And then 17, 18, and 19 are about
17 spoliation issues, discovery issues, e-mail, except that 19
18 is also about the delete -- has a little bit of bearing on
19 the merits, because it's the deletion while they were in
20 prison?

21 MR. SASO: Yes, Your Honor.

22 THE COURT: Okay. And which one -- what is --
23 which part is excessive, Mr. Joffe?

24 MR. JOFFE: Well, Your Honor, the total number is
25 20, 19 or 20, because there are one or two. I have the --

1 THE COURT: You have to say that again for the
2 court reporter, Mr. Joffe.

3 MR. JOFFE: Your Honor, the total number of
4 depositions, 20, seems excessive to us. The -- as you
5 pointed out, the last three, Sadovnikov, at Makarovsky, and
6 Grabkovksy, they only have information about the ESI issues.
7 They were not involved in the process in China or India at
8 all. Val Faybush have peripheral involvement in the process.

9 The Shinto and iHub solution employees, those are
10 intermediate parties who transported them, held the equipment
11 from India to China. And Your Honor, I think defendants
12 agree that the majority of the transceivers now in the
13 warehouse is the ones who were sold by them to the ICT. So
14 you know, there is no question that those -- that the
15 transceivers in the warehouse are the ones who were sold from
16 India and then seized by the police in China, and then now
17 here. So the relevance of the intermediate parties, Shinto,
18 who was transporting the equipment, or iHub Solutions, who
19 was storing it in the warehouse in China, is -- it's not --
20 it's not that relevant to the issue.

21 The knowledge -- the additional knowledge of ESI
22 custodians, Sadovnikov, Makarovsky, and Grabkovksy, I think
23 the defendants already took the deposition 30(b)(6)
24 deposition of Styller, the ICT representative, and he
25 testified as to when and how the e-mail boxes were deleted or

1 not. So this is just cumulative to his testimony.

2 THE COURT: Okay. So as to the deposition -- I'm
3 not resolving, conclusively today, which of those depositions
4 that you can take, Mr. Saso. I would make these
5 observations.

6 I'm not going to limit you to ten. I'm not -- it's
7 not clear to me that Mr. Joffe is asking me to limit you to
8 the presumptive ten in the rules. I'm not going to limit you
9 to ten for the following reason. The plaintiffs -- there are
10 11 plaintiffs. It would unfair, in this sprawling complaint,
11 in which the three people who were primarily injured,
12 everybody -- all these relatives of theirs and Mr. Styler
13 are bringing all these claims, and then put you to the
14 Hobbesian choice of deposing the people who are suing you for
15 money, or taking all of the relevant fact depositions, which
16 is what a limit of ten would mean here. So I'm not going to
17 limit you to ten.

18 The -- the first 14 people you list all seem
19 reasonable and appropriate to me because they're all either a
20 person who's suing you, saying they were injured and damaged,
21 or they're a witness with knowledge of the facts that gave
22 rise to the claims or both. So I presumptively think you can
23 take those 14.

24 As to the second, the next category of persons, 15
25 and 16, maybe I'm not resolving, but I'll just tell you sort

1 of some thoughts is, you know, do you really need them or
2 what difference do they really make? Is it necessary? They
3 certainly have some relevant information. But given what's
4 being agreed to or what's not, or what's in dispute, how
5 significant is it? Is it proportional to the case or not?
6 I'm not in a position to decide that now, I just urge you to
7 think about those issues.

8 As to 17 to 19, I think I'll just wait. I'll know
9 more about that after I look at the spoliation memo and
10 whether they're -- and resolve that, whether they're
11 necessary or not.

12 So assuming, for the moment, that there's 14, and
13 then turning to yours, Mr. Joffe, you have ten, are you
14 disputing any of the ten for the defendants?

15 MR. SASO: Your Honor, again, Paul Saso for the
16 defendants. We are not objecting to any of the ten
17 depositions, other than that we wanted to specifically note
18 that we reserve, obviously, the ability to object to any
19 particular topic.

20 THE COURT: Oh.

21 MR. SASO: In a formal Rule 30(b)(6) deposition
22 that is served.

23 THE COURT: Sure. All I'm asking you now is --
24 yes, you can object to topics. You can object to individual
25 questions. I'm just, in a big picture way, trying to get a

1 sense of how many.

2 So what I understand you to be saying is he's
3 within the ten, so he doesn't need permission for the ten.
4 And there isn't somebody on that list who you think that --
5 whose deposition you object to out of like, "Judge, you know,
6 Mr. O'Grady, his deposition shouldn't be taken." I don't --
7 I shouldn't be anticipating a motion like that.

8 MR. SASO: That's correct, Your Honor, we would not
9 object to the ten listed.

10 THE COURT: All right. So let's assume, for the
11 moment, that the minimum is what will occurs. And so
12 Mr. Joffe, I understand from Mr. Saso, he's saying, even if I
13 limit him to the 14, that will only shorten it. And with
14 your ten, he thinks three months from the date that the
15 summary judgment motion and other two motions are resolved is
16 reasonable.

17 My question to you is, (a), if he were limited to
18 the 14, is your only argument proportionality, or do you have
19 another argument as to why it ought to be less than the 14?

20 MR. JOFFE: Less than 14.

21 THE COURT: Less than persons -- that is, is there
22 somebody between numbers one and 14, listed on his status
23 report -- on the joint status report, which is docket number
24 308, on page 308, on page 15, who I'm not -- like who
25 presumptively you think that, "Judge, no way they should get

1 that person's deposition," or, "Judge, even if they could get
2 any one of those depositions, 14 is presumptively too many."

3 MR. JOFFE: Well, one person that I want to point
4 out is actually number 14, Val Faybush, who have very
5 peripheral involvement in the events. So out of the list of
6 14, I would agree that plaintiffs', of course, one through 11
7 could be subject properly to depositions. Quinn and Pekar --

8 THE COURT: Probably? Are you anticipating you're
9 going to object on the grounds it's not reasonable to depose
10 somebody who's brought a lawsuit.

11 MR. JOFFE: No, no, no, I was not. Your Honor, but
12 I just wanted to comment on the first 11, with the timing.
13 There is a --

14 THE COURT: I haven't got to the timing. I'm
15 trying to give you the chance, Mr. Joffe, to raise
16 everything.

17 I can conceive of two objections. One, there's
18 somebody whose deposition shouldn't be taken. You're saying
19 Faybush maybe is too peripheral; or two, you might say,
20 "Judge, all these people are reasonable people to take, but
21 it's unreasonable to take 14 in this case." I don't -- I
22 just want to give you the chance to say that before I figure
23 out the time. If there is -- if you want to say that. If
24 you don't, if you're comfortable with those things, then
25 that's fine, then we can talk about time before we get to

1 time.

2 I hear you saying probably plaintiffs are
3 reasonable to take. My view is, actually plaintiffs are
4 reasonable to take. I haven't -- if you want to give me a
5 reason why it's not appropriate to take the deposition of a
6 person who filed a lawsuit and seeks money from the
7 defendants, tell me now. Otherwise, I'm going to come to the
8 conclusion that each plaintiff is a reasonable person whose
9 deposition to take, and then we'll take about 12, 13, 14, or
10 proportionality.

11 One, is there any reason that it's not reasonable
12 to take the deposition of one of your clients?

13 MR. JOFFE: No, Your Honor, there isn't.

14 THE COURT: Okay. So we've settled that.

15 MR. JOFFE: Right.

16 THE COURT: Then Mr. Quinn, putting aside
17 proportionality for a minute, is he a reasonable person?

18 MR. JOFFE: He is.

19 THE COURT: And Mr. Pekar?

20 MR. JOFFE: He is, as well.

21 THE COURT: And Mr. Faybush you say is on the edge.

22 MR. JOFFE: No. My answer is no, because his
23 involvement is peripheral.

24 THE COURT: Because he's involvement is what?

25 MR. JOFFE: His involvement was very peripheral.

1 THE COURT: Oh. "Peripheral." Okay.

2 So you would say -- all right. One, you might
3 object to Faybush. The rest are reasonable people.

4 From a proportionality perspective, are you
5 objecting to them taking 13 or 14 depositions?

6 MR. JOFFE: No, Your Honor.

7 THE COURT: Okay. All right. Then let's assume --
8 I'm not going to resolve now Faybush, and I'm not going to
9 resolve now the other people they listed at 15 to 19.
10 Assuming for the moment that there's 13 depositions -- 14
11 depositions for the defendants, but it might be 13 -- but
12 assume 14, Mr. Joffe, because it's more -- and ten for you,
13 what do you say is the reasonable amount of time to do that,
14 from the date of my summary judgment decision?

15 MR. JOFFE: Your Honor, some of the defendants --
16 some of the plaintiffs, family plaintiffs, are in China
17 currently, and they were under coronavirus quarantine last
18 month. And as of now, there is a travel ban on traveling
19 from China.

20 THE COURT: Let's assume the following, that that
21 problem doesn't impede the depositions. And I'll tell you
22 why. Obviously, if they're not allowed to leave -- it's my
23 understanding from your filings that they can't do a video --
24 they -- we can't take their depositions by video while
25 they're in China. That would be against Chinese law?

1 MR. JOFFE: I'm not sure about that. I saw it in
2 the --

3 THE COURT: All right. So one possibility is, if
4 they're under such a travel ban, we'll figure out what to do
5 then. Then maybe we can take their deposition by video.
6 Maybe we can't. Maybe they're allowed to travel to another
7 country, even if they can't come to the United States, and
8 then we can take their video deposition. Or the lawyers
9 could go there or whatever.

10 And -- or but -- if it's resolved, if there's no
11 coronavirus impediment, if the coronavirus -- I will tell you
12 that if the coronavirus impedes the ability to perform and
13 meet the schedule, that seems like the kind of thing that I
14 would think would be good cause to extend the schedule. But
15 we don't know where things will be with corona by the time
16 we're ready to do depositions. So let's assume that's all
17 fixed, and it's all resolved.

18 So let's say we're June 1st that I resolve the
19 motion for summary judgment and the spoliation and everything
20 else, how long would you need for depositions?

21 MR. JOFFE: Your Honor, I would agree that three
22 months is a sufficient time.

23 THE COURT: Okay. For the 24 depositions?

24 MR. JOFFE: 24, 23, yes.

25 THE COURT: Yes, 23 or -- well, for 24. It might

1 end up being 23. You'd have extra time. But if it's 24,
2 it's reasonable to do it in that period of time.

3 MR. JOFFE: Yes, Your Honor.

4 THE COURT: You could do that, you and Mr. McGuire.

5 MR. JOFFE: We'll do our best to do it.

6 THE COURT: Not -- Mr. Joffe, this is your moment.
7 Okay? If you think more time -- I'm asking you what is
8 reasonable. Mr. Saso has told me what he thinks is
9 reasonable. I'm expecting, then, that he will do it in the
10 amount of time that he's asked for, and that if coronavirus
11 impedes the schedule, he'll come to me and say, "Judge,
12 coronavirus is good cause." If some other thing happens that
13 is -- that we can't now anticipate, that interferes with the
14 schedule, that might be good cause. But I'm assuming,
15 otherwise, he's not going to come to me, after two and a half
16 months, and say, "Judge, I gave it the old college try, or I
17 gave it a good shot, but it just can't be done and it was too
18 much and it was unreasonable." I'm not going to be very
19 interested in that motion.

20 So I'm asking you now, if you're telling me --
21 you're an experienced lawyer, Mr. Joffe, and you brought this
22 case, and Mr. McGuire. If you're telling me -- the reason
23 that I'm cross-examining you is speak now. If you telling me
24 it's reasonable, you are inducing me to render a ruling that
25 I am relying on your word. If you tell me "three months,"

1 I'm -- the reason that I'm asking you, I just want to be
2 clear. Then I'm, "Okay. Three months is enough time." You
3 know. I'm not going to be at the depositions.

4 Is the answer, yes, three months is a reasonable
5 period of time to do 24 or 23, if it turns out to be 23?

6 MR. JOFFE: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. SASO: Your Honor, this is Paul Saso for the
9 defendants. I did want to just make one note here, as well,
10 given that the topic of the coronavirus has come up. Even if
11 we put the coronavirus to the side for a moment, I also
12 understand that residents of China will be required to obtain
13 a specific visa that would allow them travel outside the
14 country in order to come to the United States for their
15 depositions and also to submit themselves to the medical and
16 psychological examinations that we anticipate, as well. And
17 I don't know or can't anticipate how long it may take, even
18 in a perfect world where there is no coronavirus, how long an
19 application for such a visa would take.

20 When I said three months, that is with an
21 expectation that all eight Chinese residents are available
22 for travel. But I think, at a minimum, it may mean that we
23 should be urging those eight Chinese residents to be applying
24 for visas, to the extent that they can, and keeping us
25 apprised of the status of those visa applications so that,

1 again, hypothetically, again, if Your Honor were to resolve
2 the summary judgment motion in June, we know that the visa
3 applications are already in the pipeline and hopefully are
4 even already granted for, you know, some time this summer.

5 THE COURT: I think that if what you're suggesting,
6 Mr. Saso, is planning ahead, sounds like a very wise course
7 of action to me. Since there's no -- as I understand it, if
8 plaintiff wins everything on the motions that are filed, we
9 will be taking depositions. If defendant wins everything
10 that's filed, we will be taking depositions, unless they win
11 not only spoliation, but win spoliation and win a sanction of
12 dismissal. So it seems pretty likely you should all be
13 planning on you're going to be taking depositions.

14 And coronavirus, I understand, complicates things
15 in a different way, and I understand that your estimates
16 don't account for that. The three months doesn't account for
17 that, and you fairly can't account for that at the moment.
18 But I would expect -- I think you should be, like, on your
19 side, you should be lining up people to do whatever
20 evaluations are going to happen, and the eight people in
21 China should be putting together their -- you know, making
22 efforts, to the extent they can in the current circumstances,
23 to seek whatever permissions they need to seek to come to the
24 United States. And to the extent that all of you think that
25 it might be, like, in the end, given corona and whatever the

1 issues are, it might have to occur in some other country,
2 make arrangements to try to work that out.

3 For example, if they can't come here, but you think
4 they could go to, I don't know, some other country in the --
5 not in China, not in the United States, you can think about
6 all arranging it to happen there. But I leave that, at the
7 moment, to you.

8 So three months for the depositions. Once we're
9 done with the depositions, then it's ready for trial, right?

10 MR. SASO: Your Honor, this is Paul Saso for the
11 defendants. It is maybe a little bit hard to anticipate now,
12 but there is certainly the possibility that there -- we may,
13 again, be in a position where we could move for summary
14 judgment on the second half of plaintiffs' claims after
15 depositions. And I'm sorry, there would also likely be
16 experts, as well, there.

17 THE COURT: Experts -- what's the status of
18 experts?

19 MR. SASO: I'm sorry?

20 THE COURT: Well, Mr. Joffe, are you going to have
21 any experts to support your claims, besides the ones that
22 you've already disclosed?

23 MR. JOFFE: The damages experts. We'll have
24 damages experts or an expert.

25 THE COURT: Do we have a deadline for disclosing

1 damage expert reports?

2 MR. SASO: No, Your Honor, I don't think that
3 there's any current schedule for that.

4 THE COURT: So why shouldn't that be one month
5 after the end of depositions?

6 MR. JOFFE: Okay. Thank you, Your Honor.

7 THE COURT: And then one month later for
8 defendants' rebuttal experts. And one month later for
9 depositions of those excerpts.

10 You've already taken the depositions of the
11 existing -- the experts whose reports I've seen, right?

12 MR. JOFFE: Right, Your Honor.

13 THE COURT: Okay. So let me just -- we have the
14 schedule for summary judgment that ends on May 7th. Then we
15 have a deposition schedule of three months that begins on the
16 day that I issue the decisions on the summary judgment and
17 related motions, followed by a further three months, one
18 month for expert -- for the damage expert reports, one month
19 for the rebuttal damage expert reports, and one month for
20 depositions of those experts. And then -- and your
21 evaluations of your -- of the plaintiffs is essentially by
22 your rebuttal experts, Mr. Saso?

23 MR. SASO: Your Honor, I'm not sure I heard you.
24 Could you repeat that?

25 THE COURT: Yes. The evaluations that you're

1 planning of the plaintiffs are essentially by your rebuttal
2 experts?

3 MR. SASO: Oh. Well, so, Your Honor, yeah, I do
4 think, for example, that we -- I'm not sure if this is the
5 question that you are posing, but we do anticipate that we
6 would try to schedule the examinations of the plaintiffs to
7 coincide as close as possible with their depositions so that
8 they could happen while they're in the United States, both
9 for the examination, as well as their deposition.

10 THE COURT: When are you going to disclose, though,
11 the report of that examination?

12 MR. SASO: I think that we would be able to do that
13 sort of during the deposition period. We would have to, I
14 guess, consult with that expert, but I think that they would
15 able to be turned around, you know, prior to this expert
16 schedule that we're setting out right now.

17 THE COURT: Okay. All right. Fine.

18 Assuming that everything that's in the case goes to
19 trial, and either I find on summary judgment that I do or
20 don't enter summary judgment on counterfeiting, one way or
21 the other way, how long, Mr. Joffe, do you anticipate the
22 trial to be for the presentation of your case?

23 MR. JOFFE: Hum --

24 THE COURT: You'd be presenting your clients,
25 right?

1 MR. JOFFE: Yes, Your Honor.

2 THE COURT: And you'd be presenting your expert
3 you've disclosed, correct?

4 MR. JOFFE: Yes.

5 THE COURT: And you'd be presenting, possibly --
6 are you anticipating, possibly, one or two damage experts?

7 MR. JOFFE: Yes.

8 THE COURT: And I take if one might be an economic
9 expert for Integrated?

10 MR. JOFFE: One economic and one for individual
11 plaintiffs.

12 THE COURT: And likely one expert who's -- as to
13 all of the individual plaintiffs, or multiple, or one for
14 each?

15 MR. JOFFE: No, most likely one for all.

16 THE COURT: All right. And likely to call any
17 treating physician type people?

18 MR. JOFFE: Well, the only one that could be
19 probably for one plaintiff, Styller.

20 THE COURT: All right. And then maybe some of the
21 defendants, employees, some of the people that you're
22 deposing?

23 MR. JOFFE: Yes, Your Honor.

24 THE COURT: All right. And then do you have any
25 idea how long you think it might take to present?

1 MR. JOFFE: I haven't thought about it yet, Your
2 Honor, so I don't want to just --

3 THE COURT: Okay. So have you thought about it,
4 Mr. Saso?

5 MR. SASO: Your Honor, I think -- we have put some
6 thought into it, although I'm not sure that we're prepared,
7 either, at this point, to give a strong estimate as to the
8 time of trial.

9 THE COURT: Okay. Is there anything -- I'll tell
10 you what I'm going to do. The clerk's notes will memorialize
11 the schedule for summary judgment and the briefing schedule.
12 I think Maria has that already, and she'll put it in the
13 clerk's notes. I'm going to issue a brief order that
14 summarizes the post summary judgment schedule.

15 To the extent that you think there are people that
16 you can -- I think that in that -- I think the time to
17 resolve the question of those other depositions is after I
18 resolve the summary judgment, because we'll have a better
19 idea whether you need them or not. And so I might address
20 some timing for that in the brief order that I issue about
21 the post summary judgment schedule.

22 I think I am going to set a date for trial. I'll
23 likely look at the calendar. It won't be the Monday after
24 the end of expert depositions. I will certainly allot a
25 period of time after expert depositions. You'll need the

1 transcripts, and then there's usually 30 days for filing
2 pretrial motions, and then you probably need a little bit of
3 time in between. So I will be -- and you need to think about
4 when -- when I might get -- how long it will take me to
5 resolve the pending motions. And then I'll think about the
6 rest of the schedule and a little time in between, and then
7 there might be a little more time just to allow time for all
8 of you, just in case.

9 And then I won't establish a length of the trial at
10 the moment, but you should be thinking about that. And I
11 think I'd want to confer again at the end of the summary
12 judgment decisions as to how long it will be, and we could
13 discuss that at that time.

14 If I schedule the trial, and you look at the trial
15 and you say -- which is, obviously, going to be into 2021,
16 and you say, "Oh, my child's getting married that weekend,"
17 or, "I have a graduation that weekend," or you know that
18 there's some life event, or it's like -- it interferes with
19 the school vacation, and that's the time you always take a
20 family vacation, then speak up like within two weeks of me
21 issuing this order, and say, "Judge, can we move it?" I'd be
22 perfectly happy to move it for something like that. Because
23 right now, I'm just picking a date, based on my own calendar,
24 looking at it. And I'm not hard and fast, necessarily,
25 wedded to that date, and I'd be prepared to move it.

1 But if it's the kind of -- but those kinds of
2 things, to the extent you know about them, tell me about them
3 now. If something comes up along the way, tell me about it
4 as soon as you know. If you know that something's happening
5 and you tell me six months later, I'm not going to be as
6 moved by that. If you tell me right away, I'm going to be
7 moved. I'm not looking to interfere with your life, to the
8 extent important things like that happen.

9 Or you don't need -- if you came back to me and
10 just wanted to move it a little bit right afterwards, you
11 know, you can confer with each other and say, "You know, we'd
12 like to have it this date or that date," I don't need a whole
13 lot of reason down like that. The further down the road we
14 get, the more reason I'm not going to want to move the trial
15 date.

16 Is there anything else any of you want to address
17 at this status conference?

18 MR. JOFFE: No, Your Honor.

19 THE COURT: Anything else for the defendants?

20 MR. SASO: No, Your Honor.

21 MR. BUNIS: No, Your Honor.

22 THE COURT: Okay. I take it that -- no one has
23 brought it up, so I assume that you, at the moment, wish to
24 proceed, rather than go to any sort of further mediation. I
25 know you went a long time ago.

1 Let me put it another way, since all of you are
2 standing silent, waiting for the other side to make the first
3 move.

4 I'm proceeding to resolve the case. This case is
5 an old case. This is a 2016 or early 2017 case, with a lot
6 of motion practice. I'm looking to create -- we're now at
7 the point where I can create the schedule for the rest of the
8 case, and I intend to do that. The date that I set for trial
9 will be a date on which you'll be the only case on for trial.
10 I will be resolving that for you. That's perfectly fine. We
11 built this courthouse with courtrooms for trials, so I am
12 perfectly happy to have this case go to trial.

13 And I tell people all the time, though, just remind
14 them, is what happens in a case is you cede control to your
15 lawyers, appropriately, and then your lawyers cede control to
16 me to make various rulings. And then --

17 It's a jury trial, right?

18 MR. JOFFE: Yes, Your Honor.

19 THE COURT: And then to the jury. And then you
20 can't negotiate with the jury.

21 And the choice that you should all be thinking
22 about, for both of you, all the way through, is option A is
23 like what are my, you know, risks and benefits of option A,
24 which is go down to the final resolution, and what does that
25 look like. And option B is what's the best I can work out

1 with the people right now. And the benefit of option B is
2 guaranteed, but you don't everything on option B. And you
3 just have to decide, make an informed choice over A or B, and
4 those choices change over time because your evaluation of the
5 case changes, and what happens.

6 And so I don't have a view as to whether you should
7 settle your case or not. My general view is all lawyers
8 should be thinking about that and be weighing those two
9 choices regularly and talking to their clients about it, and
10 then you make whatever decisions you make.

11 And I merely am reminding you to think about that
12 and reminding you that if you wish to go to the court's
13 mediation program, you can go at any time. You can go today.
14 You can ask at some further point, and I will send you, if
15 both of you want to go. My general practice is not to send
16 you unless you both want to go, because it -- since it's --
17 you can't settle the case without the other side. If one
18 side is not interested, then I ordinarily wouldn't send
19 you -- not never, but ordinarily.

20 So if anybody wants to raise anything about that,
21 speak now; or otherwise, we'll just keep proceeding, until
22 one of you raises it.

23 I take it nothing further, then, so we are
24 adjourned in this matter, and I will wait for your motions as
25 the next step.

1 Thank you very much. Have a good day, and we're
2 adjourned.

3 THE DEPUTY CLERK: All rise. This matter is
4 adjourned.

5 (Court in recess at 5:00 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of April, 2020.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter